UCLA
Chicana/o Latina/o Law Review

Title
Estoppel against the Government: The Immigration and Naturalization Service

Permalink
https://escholarship.org/uc/item/78802978

Journal
Chicana/o Latina/o Law Review, 2(0)

ISSN
1061-8899

Author
Asimow, Michael

Publication Date
1975

DOI
10.5070/C720020910

Copyright Information
Copyright 1975 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at https://escholarship.org/terms

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

ESTOPPEL AGAINST THE GOVERNMENT: THE IMMIGRATION AND NATURALIZATION SERVICE

MICHAEL ASIMOW*

Danielle LaVoie was a resident alien who was married to a United States citizen. She went to Africa with her husband who was a Peace Corps director. They asked the Immigration and Naturalization Service (hereinafter referred to as INS) whether this kind of absence would break the chain of continuous residence required for her naturalization.[1] The INS advised her that it would not. This advice was wrong. Also, it neglected to tell her of an accelerated naturalization provision which would have solved her problem,[2] but which could only be utilized while her husband was abroad.

When she applied for naturalization, the District Court held that it would be granted. By reason of the erroneous advice, and the failure to advise concerning accelerated naturalization, the INS was estopped to raise the argument that the continuous residence requirement had not been met.[3]

LaVoie raises in the immigration and naturalization field issues which can arise in virtually every sphere of administrative law.[4] Like the rest of the federal government, the INS dispenses a great deal of information and advice.[5] Occasionally it is wrong. Again and again, persons who have relied on the erroneous interpretation have searched for ways to prevent the government from correcting its position to their detriment. In these cases, the courts have been compelled to inquire whether the private-law doctrines of equitable estoppel and apparent authority can be utilized against the United States. Under the doctrine of estoppel,

* B.S. 1961, U.C.L.A.; LL.B. 1964, Cal., Berkeley. Professor of Law, University of California, Los Angeles.

1. Naturalization as the spouse of a United States citizen requires continuous residence of three years. A break in residence of more than one year will interrupt the required continuity. 8 U.S.C. §§ 1430(a), 1427(b) (1970).
2. 8 U.S.C. § 1430(b) (1970).
3. Petition of LaVoie, 349 F. Supp. 68 (D.V.I. 1972). *LaVoie* is discussed in greater detail at text accompanying note 97, *infra*.
4. *See generally* ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES Ch. 3 (1973) (hereinafter referred to as ADVICE).
5. ADVICE 158-59.

if *A*'s conduct causes *B* to rely in good faith, and thus change his position for the worse, *A* is precluded from asserting rights against *B* inconsistently with *A*'s conduct.[6] This protean principle has been found useful in a vast number of situations arising in the private law sector.[7]

Under the concept of "apparent authority" a principal may be bound by the actions of someone who was not his agent, or was his agent but whose actual authority was limited, if the "principal's" conduct *vis-a-vis* the third party creates the appearance that the "agent" had authority.[8]

Can the federal government be estopped? Can private parties assert the principle of apparent authority against the federal government? These questions have been asked since the earliest days of the republic. Although the Supreme Court has spoken to them again and again, for the most part consistently, the problems remain unsettled and confusing.[9]

Too often, estoppel law has developed independently in each agency, without recognition that the same problems arise under many statutes. In this article, I will first survey the highly confused legal status of estoppel of the federal government. Then I shall contrast the law concerning estoppel of the government in immigration and naturalization cases which has had its own unique development. It is my hope that this comparative treatment will be helpful to immigration law practitioners who encounter estoppel problems in dealing with the INS.

I. VINDICATION OF RELIANCE INTERESTS AGAINST THE GOVERNMENT[10]

A. Government Functions Resembling Private Sector Activities

The majority of significant cases in which private parties

6. See the classic definition in 3 POMEROY, EQUITY JURISPRUDENCE § 804 (5th ed., 1941).

7. Equitable estoppel is entirely distinct from collateral estoppel—that is, estoppel created by a judgment in an adjudication. Collateral estoppel is outside the scope of this article. However, at times, the two concepts come close to merging. *See* text at notes 34-36, 53 *infra*.

8. RESTATEMENT (SECOND) OF AGENCY §§ 8, 27, 49 (1957).

9. Estoppel asserted against the government is often different from estoppel claimed against private parties. More often than not, a statement of law (or a mixed law-fact statement) by the government employee induces the reliance of an outsider. However, the private-law concept of equitable estoppel generally covers only representations of fact. Some writers have referred to estoppel covering matters of law (or mixed law-fact questions) as "quasi-estoppel." Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied against the United States in Federal Tax Controversies*, 19 TAX. L. REV. 487 (1964). However, I shall use the simpler term "estoppel" herein, with the understanding that representations of both law and fact are included.

10. Much of the material in this section has been adapted from chapter 3 of ADVICE. Permission was granted by the copyright holder, Matthew Bender & Co.

have sought to bind the government based on erroneous interpretations have arisen in government programs which have private sector counterparts.[11] When the government contracts to acquire or dispose of goods or services; deals in its lands; litigates to enforce a claim or defend against one; insures against death, disability, crop damage, or financial losses; or finances small business or farming operations, its actions have obvious private analogies. These are routine business activities in which government and non-government institutions take part. It would be easy and natural to argue that the government should be bound by apparent authority and estoppel in this domain if a comparable private businessman would be. However, present law bears no likeness to this generalization. Instead, the courts generally decline to bind the government when the error concerns a statute or regulation. The theory on which the government avoids being bound is that government agents have no *authority* to make errors of law. In these cases, the contention that the government is immune from *estoppel*—an offshoot of sovereign immunity—plays a lesser role. Primarily, then, the problem in these cases is one of agency law—what is the authority of government agents. The sovereign immunity issue is secondary.

The foundation for all that followed was laid in 1813 by the Supreme Court in *Lee v. Munroe*.[12] Lee was a creditor of Morris. Morris had paid for some federal lands which Munroe (a government employee) would deed to Morris' designees. Lee desired to accept some of this land in discharge of the debt Morris owed to him. In response to a question by Lee, Munroe stated that the government still held land which Morris had paid for. Lee then took action which disabled him from suing Morris. However, Munroe's advice to Lee was wrong; Morris already had all the land he had paid for. By the time this was discovered, Morris had become insolvent.

The Supreme Court conceded that these facts might have resulted in an estoppel to deny the truthfulness of the representation if a private principal rather than the government were involved. A private principal could be bound by misinformation furnished by his agent if the agent's authority was clear. However, the Court held that Munroe's *authority* did not extend to making such representations. His job was to sell and convey land; his representation to Lee

---

11. I have intentionally not referred to these functions as "proprietary" because the term has acquired a long and unfortunate history in the area of municipal sovereign immunity. *See* DAVIS, ADMINISTRATIVE LAW § 25.07 (1958) (hereinafter referred to as DAVIS). Fortunately, the distinctions employed in sovereign immunity cases need not be employed in understanding the estoppel cases.

12. 11 U.S. (7 Cranch) 366 (1813).

> was altogether gratuitous, and that not being within the sphere of [his] official duties, the United States cannot be injured by it. . . . Were it otherwise, an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very valuable and large tracts of real estate, and even produce alienations of them without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes than to introduce a rule, against an abuse of which, by improper collusions, it should be very difficult for the public interest to protect itself.[13]

Thus was born the rule that the government could not be estopped. However, the *Lee* case was not based on the theory that government is immune from estoppel; instead it was based on agency principles. The job of a land commissioner was to sell and convey land, not to give advice to creditors of the buyer. Undoubtedly, in private law, the principle of *apparent authority* would have clothed such an agent with power to make the representation, thus binding his principal by estoppel. But according to *Lee*, the government is not subject to estoppel since its agents lack authority to advise the public or, even if they have authority to advise, to make mistakes in giving advice.

At the time of the *Lee* case, there was still doubt about whether the federal government had sovereign immunity from actions in contract or tort against it; a few years later, however, the sovereign immunity principle began to take root.[14] Thus it is hardly surprising that a government immune from an unconsented suit for the torts or contracts of its agents could escape liability based on estoppel principles where the agent's authority to bind the government had not been established.

From 1813, down to the present day, in cases involving government activities with private analogues, the Supreme Court has held fast to the principles set forth in *Lee*: government agents have no apparent authority to give advice or to make mistakes in giving advice. Thus in *The Floyd Acceptances*,[15] the Secretary of War advanced money to a Civil War contractor by issuing drafts. The drafts passed into the hands of *bona fide* purchasers who sought to require the government to pay. But a federal statute provided that the government could make no advance of public money. Although the Court noted that the government

13. *Id.* at 369-70. *Similarly see* Whiteside v. United States, 93 U.S. 247 (1876), which makes it particularly clear that the problem in such cases is lack of authority.
14. DAVIS § 25.01.
15. 74 U.S. (7 Wall) 667 (1869).

could be bound on commerical paper like any private individual, it held that those who deal with the government must at their peril ascertain the authority of the agent with whom they deal. A broader doctrine of agency authority might ruin the government by placing it at the mercy of its agents.[16]

In *Utah Power and Light Co. v. United States*,[17] a utility built generating works on government lands after government officials had advised it that the government's ownership would be no obstacle to construction or operation of the works. Perhaps this was a case in which the utility's reliance was not in good faith since prudence would dictate that it obtain a more definitive statement of the government's intention. But the Court held broadly that the government could eject the utility and collect rent for use of the land. Relying on *Lee* and similar cases,[18] the Court noted that the United States cannot be bound or estopped by the acts of its agents in agreeing to something which the law does not permit. Here the Court mingled two theories: (a) the government cannot be estopped (an aspect of sovereign immunity) and (b) the government's agents had no authority to permit construction on the government's land.[19]

The emphasis returned strongly to the authority issue in the best known case in this line, *Federal Crop Insurance Corp. v. Merrill*,[20] a 5-4 decision of the Supreme Court in 1947. The simple and appealing facts of this case contrast with the harshness of the result. Merrill, an Idaho wheat farmer, was advised by the local agent of the FCIC that a certain crop was insurable. However, this advice was wrong; the FCIC's regulations, duly published in the Federal Register, made the crop uninsurable. When drought destroyed the crop, the government denied liability. The Idaho Supreme Court decision which held the government bound by estoppel was reversed by the United States Supreme Court. Acknowledging that the case "no doubt presents phases of hardship," the Court declared that it

---

16. *Similarly see* Sutton v. United States, 256 U.S. 575 (1921), which held that government officials could have no authority to commit the government on a contract in excess of the amount appropriated for that purpose. *See also* Filor v. United States, 76 U.S. (9 Wall) 45 (1869).

17. 243 U.S. 389 (1917).

18. Pine River Logging & Improvement Co. v. United States, 186 U.S. 279 (1902); Hart v. United States, 95 U.S. 316 (1877).

19. Similar cases involving government property are Utah v. United States, 284 U.S. 534 (1932); United States v. California, 332 U.S. 19, 40 (1947).

20. 332 U.S. 380 (1947), *reversing* 67 Idaho 196, 174 P.2d 834 (1946). Professor Davis observed that Merrill did a wretched job of briefing the issue of binding effect. Consequently, the Court had no proper opportunity to reexamine the merits of prior law. DAVIS § 17.02. Whelan and Dunigan noted that one of the farmers in *Merrill* was named A.A. Merrill. Plaintiff's counsel was also named A.A. Merrill. Conceivably the Court surmised that a farmer-lawyer should have checked the Federal Register. Whelan & Dunigan, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L.J. 830, 836 n.28 (1967).

> is too late in the day to urge that the Government is just another private litigant. . . . Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . . And this is so even though, as here, the agent himself may have been unaware of the limitations on his authority. . . . The Wheat Crop Insurance Regulations were binding upon all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. . . . "Men must turn square corners when they deal with the Government. . . ."[21]

Since the *Merrill* decision, most lower courts have been faithful to its rigorous prescription. In cases involving government activities with private analogues, the answer to contentions based on reliance has been that the government agent had no authority to make the mistake or otherwise to bind the government on a position of law.[22] Cases involving the Federal Crop Insurance Corporation have been particularly harsh,[23] although personnel of that agency state that their present policy now is not to recoup erroneous payments once they are made.[24]

An especially striking example is *United States v. Zenith-Godley Co.*[25] The statute provided that butter producers could receive a subsidy through selling butter to the government and

---

21. 332 U.S. 383-85. The Court cited *Utah Power & Light* and *The Floyd Acceptances* as well as United States v. Stewart, 311 U.S. 60 (1940), a tax case involving reliance upon a circular which erroneously conferred a tax exemption. Mr. Justice Jackson's dissenting opinion is characteristically trenchant.

22. *E.g.*, Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972); Michals v. Fed. Sav. & Loan Ins. Corp., 413 F.2d 144 (7th Cir. 1969); Mahoney v. Federal Sav. & Loan Ins. Co., 393 F.2d 156 (7th Cir. 1968), *cert. denied*, 393 U.S 837; ANA Small Business Investments, Inc. v. SBA, 391 F.2d 739 (9th Cir. 1968); United States v. Rossi, 342 F.2d 505 (9th Cir. 1965); Byrne Organization v. United States, 287 F.2d 582 (Ct. Cl. 1961); Stone v. United States, 286 F.2d 56 (8th Cir. 1961); United States v. Hoffart, 256 F.2d 186 (8th Cir. 1958); Virgin Islands v. Gordon, 244 F.2d 818 (3d Cir. 1957); United States v. West, 232 F.2d 694 (9th Cir. 1956); McIndoe v. United States, 194 F.2d 602 (9th Cir. 1952); Gerber v. Seamans, 332 F. Supp. 1187 (S.D.N.Y. 1971); United States v. Love, 324 F. Supp. 1038 (E.D. Mich. 1971); Jackson v. United States, 234 F. Supp. 586 (E.D.S.C. 1964); Newman v. United States, 135 F. Supp. 953 (Ct. Cl. 1955). On the particular facts, not all of these cases present strong claims for estoppel of the government; consequently, the court's reliance on *Merrill* and *Utah Power & Light* represent alternative grounds. It has been suggested that the problems in this area are being so rapidly solved by case law that no corrective legislation is needed. The copious citations in this and the next footnotes are intended to show that the problem is indeed a live one.

23. Dauzat v. FCIC, 339 F. Supp. 567 (W.D. La. 1972); McFarlin v. FCIC, 438 F.2d 1237 (9th Cir. 1971). *Dauzat* is a strikingly inequitable case involving misadvice about a land survey.

24. ADVICE, *supra* note 4, at 151.

25. 180 F. Supp. 611 (S.D.N.Y. 1960), *affirmed*, 295 F.2d 634 (2d Cir. 1961).

repurchasing it for 3¢ per pound less than the sales price. Through Departmental Announcement 112, the Agriculture Department declared that this formality was unnecessary; the subsidy would be paid without shipping the butter to the government. Relying on this announcement, defendants applied for and received a subsidy. The DA 112 procedure was illegal; the subsidy could be paid only through *bona fide* sales and repurchases. Even though it had induced the error, and despite the glaring inequity of its position, the government was permitted to recoup the illegal subsidies. Relying on *Merrill*, the court held that the Secretary of Agriculture had no authority to change the statutory procedure; consequently, the government was not estopped and the payments could be recovered.[26] The defendants offered some plausible means by which *Merrill* might be distinguished:

(a) Apparently wheat farmers could not obtain private insurance, so Merrill had really lost nothing. However, the butter producers in *Zenith-Godley* could have obtained their subsidy if only they had used the correct procedure.

(b) The advice in *Merrill* came informally from a low-level official. The misinformation in *Zenith-Godley* came in a published pronouncement from the Secretary of Agriculture.

The court declined to distinguish *Merrill*. The only way it could find to remedy the gross inequity was to deny the government prejudgment interest on its claim.

B. *The Drift Away from the Supreme Court Precedents*

In recent years, some lower courts have succeeded in breaking sharply with the seemingly impregnable Supreme Court precedents found in *Utah Power and Light* and *Merrill*. Especially in the Ninth Circuit and the Court of Claims, ways around the rigid no-apparent-authority and no-estoppel formulations have been found. Often, the reasoning in these opinions is hard to follow; this is scarcely surprising in light of the formidable Supreme Court authority opposed to the positions they have taken.

In a number of government contract cases, the person making the error has been found to have actual authority to make the particular mistake. Once that barrier is hurdled, the courts have cautiously gone on to hold the government bound in contract or by estoppel. For example, in *Manloading and Management As-*

26. *Similarly, see* Stone v. United States, *supra* note 22; United States v. Bonderer, 139 F. Supp. 391 (W.D. Mo. 1956). *But see* United States v. Pennsylvania Industrial Chemical Co., 411 U.S. 655 (1973), in which reliance upon an erroneous regulation protected the defendant from *criminal* prosecution.

sociates v. United States,[27] the government invited bids on a contract; the invitation and the contract itself clearly stated that the contract was for two months only, renewable at the option of the government. At the pre-bid conference, Mr. Scala, who was designated as the government's representative, stated that the option was designed to permit the government to terminate for lack of funds but that funds were available and that bidders could be certain that the contract would be renewed for at least one additional year. Plaintiff received the contract and incurred substantial costs, relying on the representation that the contract would extend at least for 14 months. However, following a bid protest by another bidder, the government terminated the contract. The court held that Scala was authorized to make the erroneous representation; it followed that the government was bound by estoppel.[28] The factual basis for estoppel was present, the government was acting in a "proprietary capacity," and Scala's statement did not contravene any statutory requirement, only a provision in the written contract. The holding that Scala had authority is the interesting aspect of this opinion. It suggests that the actual authority of the person designated to represent the government at the prebidder's conference includes the authority to make mistakes about the contract. This reasoning would seem to be a sharp break from the principle of *Lee v. Munroe* that government officials have no authority to give mistaken advice.[29] However, so far the government contract cases have not conferred authority to make errors concerning statutes or regulations; they are still treated as absolute limitations on authority.[30]

Another type of case which departs from the strictness of the Supreme Court holdings involves government attorneys in the course of litigation. It has been held that they have authority to make representations or agreements contrary to law, thus binding

27. 461 F.2d 1299 (Ct. Cl. 1972).

28. *Similarly, see* Emeco Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973); United States v. Bissett-Berman Corp., 481 F.2d 764 (9th Cir. 1973); Gresham v. United States, 470 F.2d 542 (Ct. Cl. 1972); Carrier Corp. v. United States, 328 F.2d 328 (Ct. Cl. 1964) (3-2 division); Semaan v. Mumford, 335 F.2d 704 (D.C. Cir. 1964) (relating to government employment) (Burger, J. dissenting); George H. Whike Construction Co. v. United States, 140 F. Supp. 560 (Ct. Cl. 1956); Branch Banking & Trust Co. v. United States, 98 F. Supp. 757, *cert. denied* 342 U.S. 893 (1951). For administrative decisions to the same effect, *see* Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations*, 57 VA. L. REV. 171, 200-03 (1971); McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 GEO. WASH. L. REV. 162, 169-73 (1956). *Cf.* Christie v. United States, 237 U.S. 234 (1915) (contractual bid induced by fraud of government employee).

29. Discussed at text accompanying notes 12-13 *supra*.

30. *E.g.*, Prestex v. United States, 320 F.2d 367 (Ct. Cl. 1963). United States v. Zenith-Godley Co., discussed at text accompanying notes 25-26 *supra*. Many of the cases in note 22 *supra*, are of this kind. *But see* United States v. Lazy FC Ranch, discussed at text accompanying notes 37-46 *infra*.

the government. Thus in *Hoffman v. Celebrezze*,[31] the government's attorney agreed to adding interest to the amount of a judgment against the government. Although this was contrary to law, the court held the government bound, declaring that the attorney's authority covered such errors.

Another approach has been to treat government misinformation as negativing the elements which the government must establish to penalize the advice-seeker. A frequently cited example is *United States v. Fox Lake State Bank*[32] in which the government sued for penalties under the False Claims Act. FHA loan guaranties had been induced by fraud of the bank's customers and of a bank employee; these facts were already known to FHA personnel. The bank made claims for payment under the guaranties as a method of receiving a ruling from FHA on whether the claims were legally payable; various banking authorities were pressing the bank to ascertain from FHA the status of the loan guaranties. FHA personnel told the bank to submit the claims *as a method of obtaining a ruling*. However, because of the ineptitude of a bank employee, the claims failed to divulge the customer's fraud. It was held that the government was estopped to demand forfeitures by reason of the false claims for payment under the guaranties. FHA employees already knew about the customer's fraud; more important, FHA personnel told the bank to submit the claims for payment as a method of obtaining a legal ruling, not as an actual claim for the money. Consequently, the government could not now treat the claims as "claims" under the False Claims Act. The court declared that the government could be estopped although great caution was in order. The court seemingly ignored the problem of lack of authority of FHA employees to represent to the bank that it could obtain a legal ruling by submitting a claim and that such a claim would not be treated as a "claim" for purposes of the False Claims Act.[33]

Still another way to avoid the Supreme Court precedents was discovered by the Ninth Circuit in *Brandt v. Hickel*.[34] Brandt applied for an oil lease from the Bureau of Land Management; she was told that it was not in the proper form, and that she could

31. 405 F.2d 833 (8th Cir. 1969) (Blackmun, J. dissenting). *See also* United States v. Coast Wineries, 131 F.2d 643 (9th Cir. 1942); Buder v. United States, 332 F. Supp. 345 (E.D. Mo. 1971); United States v. 687.3 Acres of Land, 319 F. Supp. 128 (D. Neb. 1970).

32. 366 F.2d 962 (7th Cir. 1966).

33. Most significantly, the Supreme Court has held that an erroneous regulation of the Corps of Engineers could, if reasonably relied upon, prevent *criminal* prosecution. United States v. Pennsylvania Industrial Chemical Co., 411 U.S. 655 (1973). *See also* United States v. Lazy FC Ranch, 324 F. Supp. 698 (D. Ida. 1971); *affirmed on other grounds*, 481 F.2d 985 (9th Cir. 1973), in which government misadvice made an illegal claim for subsidies not "false or fraudulent" under the False Claims Act.

34. 427 F.2d 53 (9th Cir. 1970).

substitute a new form within 30 days and not lose her priority during the 30-day period. Consequently, Brandt withdrew the application and submitted a new one; however, before the new one was filed, Hansen applied for the same lease. The Interior Department decided that the original representation made to Brandt was wrong in two respects: (a) the application was in proper form, but (b) there was no legal basis for withdrawal of an application during which time the applicant could still retain her priority. Consequently, Brandt's withdrawal of her application meant that she lost her priority and Hansen got the lease. The correct approach would have been to appeal the original denial; then her priority would have been maintained.

The Ninth Circuit reversed on two distinct grounds. The first was that the lease application procedure was an adjudicatory process and Brandt's constitutional rights had been violated when she was stripped of her priority without proper notice that she could lose her priority and of the right to appeal. The second was based on estoppel; although the representation about withdrawal was unauthorized, the government was nevertheless bound because the matter had been an actual administrative adjudication. Consequently, the decision may actually be based more on collateral estoppel, a *res judicata* concept, rather than on equitable estoppel.[35] Perhaps *Brandt* is also explainable on the basis that the effect of estoppel is to transfer the lease from one private individual to another; the interests of the government are only peripherally involved. More broadly read, however, *Brandt* holds real possibilities for courts which wish to escape the clutches of *Merrill* and *Utah Power and Light*. If it is possible to classify the administrative process as adjudicatory, the government's misinformation can be treated as binding upon the government within the meaning of administrative *res judicata*.[36]

A few cases have declared straightforwardly that the government is subject to apparent authority and can be estopped in its financial or property dealings. The most conspicuous case is *United States v. Lazy FC Ranch*,[37] decided by the Ninth Circuit

35. The cases on which *Brandt* relies can also be explained on the basis that they employ collateral estoppel rather than equitable estoppel reasoning. In Seaton v. Texas Co., 256 F.2d 718 (D.C. Cir. 1958) (Burger, J. dissenting), the Secretary's decision in a factually similar case was set aside as an abuse of discretion. And in Chapman v. El Paso Natural Gas Co., 204 F.2d 46 (D.C. Cir. 1953), the Secretary's decision granting a pipeline easement was treated as *res judicata* so that he could not later add additional requirements which the grantee must meet.

36. For a comprehensive treatment of administrative *res judicata*, *see* DAVIS §§ 18.01-18.12 (1958 and 1970 Supp.), especially § 18.08 on classifying action as adjudicatory in nature.

37. 481 F.2d 985 (9th Cir. 1973). An important precursor to *Lazy FC Ranch* was the Ninth Circuit's decision in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970). In *Georgia Pacific*, the defendant had contracted

in 1973. In 1957, the local manager of the Agricultural Stabilization and Conservation Service (ASCS) met with the defendant partners. They wished to discover how the statutory ceiling for Soil Bank payments applied to their operations. If the partnership was treated as a single producer, they would not have entered the program. But if it was possible to treat each partner separately for purposes of applying the ceiling, they were willing to withdraw part of their land and put it in the Soil Bank. The manager described a method by which they could be treated as separate producers and, relying on this advice, they entered the program. The contracts were approved by the local and state offices of ASCS. It was not clear whether the advice was right or not. However, a year later in 1958, the Department of Agriculture adopted a regulation which clearly treated the partnership as a single entity. The defendants did not know about the amended regulation and received payments from 1958 to 1961. Their application to withdraw from the program in 1958 was rejected. Ultimately, the noncompliance with the regulation was discovered, and the Government sued for recovery of money paid in excess of the ceiling.

The Ninth Circuit held forthrightly that the government was estopped to recover the payments.[38] For its holding that estoppel is applicable to the United States when justice and fair play require it, it relied on *Moser v. United States*,[39] a naturalization case relied upon for the first time outside the immigration and naturalization field.[40] In addition, the Ninth Circuit relied on *Schuster*,[41] a tax case; *Brandt v. Hickel*,[42] a collateral estoppel decision; and *Gestuvo*,[43] a District Court decision involving estoppel in the immigration field.

The Ninth Circuit declared:

> In the case at bar, it would be a great injustice if the government were not held responsible for the advice it gave the

to convey timber lands to the United States. But government employees gave the impression that the government did not intend to enforce the contract. This caused the defendant to spend large sums improving the lands. It was held that the United States could be estopped in its property dealings and the no-estoppel rule was discredited. *See also* United States v. Consolidated Mines and Smelting Co., 455 F.2d 432 (9th Cir. 1971).

38. There was an easy way out. A statute, 7 U.S.C. § 1816, 73 Stat. 552 (1959), provided an administrative procedure authorizing the government to permit a producer to keep money which he had received in reliance on erroneous advice. It would have been easy to hold that the Secretary had abused his discretion in refusing to allow the farmers relief under this provision. *See* the tax cases involving INTERNAL REVENUE CODE § 7805(b) discussed in ADVICE 44-48. However, the Ninth Circuit declined to base its holding on the ground of the special statute.

39. 341 U.S. 41 (1951).

40. I discuss *Moser* in detail at text accompanying notes 83-86 *infra.*

41. 312 F.2d 311 (9th Cir. 1962), discussed at notes 56-57 *infra.*

42. See note 34 *supra.*

43. Gestuvo v. Dist. Director INS, 337 F. Supp. 1093 (C.D. Cal. 1971), discussed at text accompanying notes 100-01 *infra.*

> Ranch. . . . The United States received the full benefits of the contract and the partners lost at least as much profit from not farming as they received in government payments. We do not think that under these circumstances the public policy of the United States would be significantly frustrated by permitting the partners to regain the additional payments that were improper only because they exceeded the maximum payment regulations.[44]

Merrill, of course, was so strikingly similar to *Lazy FC Ranch* that the court had to strain to distinguish it. It managed the feat, however, noting that in *Merrill* no private insurance was available to the farmer. Consequently, they had not detrimentally relied on the erroneous advice.[45] Although this may be factually true, it was referred to only obliquely and certainly not relied upon by the Supreme Court in *Merrill*. Moreover, Merrill might well have relied on the erroneous advice in the sense that he might not have planted the crop at all if he could not have obtained insurance.

Lazy FC Ranch is an extremely significant case in the slow retreat by the lower courts from the rigors of *Utah Power and Light* and *Merrill*. It is one of the very few which permit the interests of the private party to override a specific regulation.[46] It relied upon *Moser*, an immigration case which never used the word estoppel and which has remarkably weak facts for binding the government. It relegates *Merrill* to the category of failure to prove detrimental reliance, a characterization which would remove its precedential value. Its holding necessarily implies that government officials had apparent authority to bind the government, contrary to a specific regulation. If *Lazy FC Ranch* is followed by other circuits, much of the edifice so painstakingly constructed by the Supreme Court would crumble. However, even after *Lazy FC Ranch*, there would still be substantial doubt whether a government employee would have authority to bind the government in a manner which was contrary to a *statute*, rather than a regulation.

44. 481 F.2d at 989-990. The court noted that estoppel was more likely in connection with the government's proprietary activities than its sovereign activities, since it would be less likely that the public would be harmed by estoppel against the government in a proprietary capacity. However, it held that it had no need to classify the Soil Bank program as either proprietary or sovereign, since estoppel was a possibility in either case. It is not at all clear that estoppel is generally more appropriate in areas relating to proprietary rather than sovereign functions. Estoppel against the government is best established in two areas relating to sovereign functions—immigration and selective service. The financial losses to the government from estoppel in a particular proprietary dispute could be of great magnitude; the loss to the government from a particular sovereign dispute could be insignificant.

45. This argument was rejected in United States v. Zenith-Godley Co., discussed at text accompanying notes 25-26, *supra*.

46. Compare, for example, the extreme harshness of the *Zenith-Godley* case, described in text accompanying notes 25-26 *supra*.

C. *Binding the Government in Tax Cases*

In collecting revenue the government performs functions which have no private analogue. Many cases have arisen in which private parties have tested the binding effect of official misinformation (or misleading conduct) in this domain. The case law has developed for the most part independently of the law which has already been discussed relating to governmental functions analogous to private sector functions.

The complexity of the tax law, the universality of its application, and the great size and pervasiveness of the Internal Revenue Service (IRS) have made the tax area a fertile source of disputes in which taxpayers have sought to prevent the government from correcting its errors. As a matter of policy, changes in tax regulations, published rulings and private rulings to the taxpayer are generally prospective only.[47] However, this has not always been the case.[48] Furthermore, taxpayers frequently rely to their detriment on erroneous advice given informally by IRS personnel, or on the approval by an IRS agent of an item on a tax return, or upon private rulings made to other taxpayers. The IRS has never considered itself bound in these situations.

As the following discussion will show, the Supreme Court has consistently permitted the retroactive correction of errors, whatever the level from which the error emanated. When the error has come from the highest possible administrative level, the decisions have relied on the proposition that in this uniquely sovereign capacity the government is immune from estoppel. When the error emanates from lower levels of the IRS, the courts have also stated that the employee lacked the authority to make errors. Finally, the holding that the government is not estopped is sometimes only a prelude to the further analysis of whether, under a special statute relating to tax cases, the government has abused its discretion.

In the early 1950's the courts began to stray from the traditional rule in tax cases of no-estoppel and no-apparent authority. In *Stockstrom v. Commissioner*,[49] the Court of Appeals held that the government could be estopped from pleading the statute of limitations when its conduct was responsible for the taxpayer's failure to file returns which would have started the limitations period running. However, in 1957, the Supreme Court sought to restore order in *Automobile Club of Michigan v. Commissioner*.[50] In that case the Commissioner's published rulings had treated automobile

47. *See* ADVICE, *supra* note 4, at 159-64.
48. *E.g.*, Etter Grain Co. v. United States, 462 F.2d 259 (9th Cir. 1972).
49. 190 F.2d 283 (D.C. Cir. 1951).
50. 353 U.S. 180 (1957).

clubs as included in a statutory category of tax exempt entities. Taxpayer also received specific private rulings to the same effect, instructing it to file only Form 990, the information return required of exempt organizations, rather than ordinary tax returns. In 1943, the published ruling was prospectively revoked by a new published ruling. Not until 1945 did the IRS revoke taxpayer's private letter ruling; the revocation was retroactive to 1943 and 1944. In 1945, taxpayer filed tax returns for the years 1943 and 1944.

The Court declared that equitable estoppel could never prevent the Commissioner from correcting a *mistake of law*. The Court disapproved *Stockstrom* "to the extent it holds the contrary." The taxpayer also argued that the statute of limitations begins only upon the filing of returns. Taxpayer argued that its failure to file returns in 1943 and 1944 was excused by its reliance on the private rulings. Alternatively, it contended that the Forms 990 it had filed in 1943 and 1944 should be treated as returns. Again, the Court declined to accept this proposition; the IRS had no power to alter the requirement that the statute of limitations begins to run only from the date of filing a return. The Forms 990 could not be treated as returns since they lacked sufficient data necessary to compute the tax.

Plainly, *Automobile Club* presented very weak estoppel facts. Taxpayer was on notice in 1943 that the Commissioner's position had changed. Taxpayer could not in good faith continue to rely on the private rulings to it as an excuse for acting as an exempt organization (if that constitutes reliance)[51] or for failure to file returns. However, in light of the disapproval of *Stockstrom*, the force of the holding is unmistakable, at least insofar as errors of law are concerned.

The severity of the holding in cases like *Automobile Club* has occasionally been mitigated through the use of section 7805 (b) of the Internal Revenue Code. This provision, as interpreted by the courts, permits the courts to set aside as an abuse of discretionary action in which the Commissioner retroactively revokes a ruling or a regulation.[52]

Some additional techniques of protecting reliance interests have also been developed in tax cases. One rather poorly defined line of cases invokes the principles of collateral estoppel to prevent

---

51. For a case involving reliance of this kind, *see* Lesavoy Foundation v. Commissioner, 238 F.2d 589 (3d Cir. 1956).

52. *See* ADVICE 44-48 and Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487 (1964). A recent example is Barbara Newman, 1974-45 TAX COURT MEMO.

changes of position by the IRS.[53] However, this theory can only apply if the former position was one determined in adjudication, a factor not ordinarily present under current tax administration. Still other areas have applied the doctrine of election of remedies against the IRS,[54] and others have strained to interpret a change in position as prospective only in application.[55]

Finally, a few tax cases take the position that the concepts of apparent authority and estoppel can apply against the United States, even if section 7805(b) does not. The most striking case is *Schuster v. Commissioner*.[56] The Service audited an estate tax return, asserted a deficiency as to several items, but decided that for tax purposes the estate did not include the corpus of an inter vivos trust. Subsequently, the time came for distribution of the corpus of the trust to the remainderman. The remainderman told the trustee (a bank) that the IRS had decided that all estate taxes had been paid; consequently, the trust assets were distributed to the remainderman. The IRS then changed its position and decided that the trust was taxable. By this time the statute of limitations had run against the estate. The statute permitted recovery of the tax from a trustee, however, and the statute of limitations had not run against the bank. The Ninth Circuit held the government estopped from collecting the tax from the bank. It viewed *Automobile Club* as generally, but not always, precluding estoppel to correct a legal mistake. The court stated:

> It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict the injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context. But as long as the concept of estoppel retains any validity, it is conceivable that such situations might arise.[57]

The court found "profound and unconscionable injury" in *Schuster* because the bank had acted reasonably and had no way to protect itself from the remainderman's demand. The liability would come from its own pocket, not the trust corpus. This seemed unjust since the bank had never enjoyed the use of the corpus; it had only acted as a trustee.

---

53. *E.g.*, Woodworth v. Kales, 26 F.2d 178 (6th Cir. 1928). *See* ADVICE 48-50.
54. Vestal v. Commissioner, 152 F.2d 132 (D.C. Cir. 1945).
55. Crespo v. United States, 399 F.2d 191 (Ct. Cl. 1968).
56. 312 F.2d 311 (9th Cir. 1962). Note that the Ninth Circuit has been the most innovative circuit in the estoppel area. *See* cases cited in notes 34, 37 *supra* and 89, 90, and 100 *infra*.
57. *Id.* at 317.

Schuster is one of relatively few tax cases[58] which stray from the strict rule of the *Automobile Club* case. More typical is *Posey v. United States*.[59] Posey wanted to liquidate his corporation under the special rule of Internal Revenue Code section 333 which would permit the liquidation to occur without tax. He met with employees in the district director's office who told him that the corporation should file Form 964. Form 964 was filed and the corporation was liquidated. But the IRS personnel failed to tell Posey that the stockholders must file *Form 966* to take advantage of section 333. It was held that Posey lost the benefits of section 333; the government was not estopped. The court was sensitive to the "strong moral implications" of its decision, but held that "chaos" would often result if IRS employees who advise taxpayers could bind the government contrary to the law and regulations. The case is particularly striking since an estoppel would work no real harm to the government; Posey would have been entitled to claim the benefits of section 333 except for the failure to observe a statutory formality, an omission directly caused by an error of government employees who are employed to give advice and information to taxpayers.[60]

D. *Binding the Government in Selective Service Cases*

Those subject to conscription were vast in number and, as a rule, unsophisticated. Yet they played for high stakes with formidably complex statutes and procedures. Consequently, the information-giving function of the Selective Service System was intensely important in the administration of the draft. Great amounts of information were dispensed by local board employees. Although the System provided government appeal agents and advisors to registrants at local boards, most of the information was furnished over-the-counter by local board clerks. The National Office of Selective Service also furnished information and advice as requested by registrants.[61]

Some of the information given by local board clerks was incorrect. This was inevitable in light of the huge quantity of infor-

58. Others are Walsonavich v. United States, 335 F.2d 96 (3d Cir. 1964); Simmons v. United States, 308 F.2d 938 (5th Cir. 1962) (dictum) (also based in part on § 1108 of the 1926 REVENUE ACT); Leck Co. v. United States, 32 AFTR 2d 5891 (D. Minn. 1973) (dictum); Smale & Robinson v. United States, 123 F. Supp. 457 (S.D. Cal. 1954); Exchange & Sav. Bank of Berlin v. United States, 226 F. Supp. 56 (D. Md. 1964).

59. 449 F.2d 228 (5th Cir. 1971).

60. *Similarly see* Etter Grain Co. v. United States, 462 F.2d 259 (5th Cir. 1972); Bay Sound Transp. Co. v. United States, 410 F.2d 505 (5th Cir. 1969), *cert. denied*, 396 U.S. 928 (1970); Commissioner v. Mooneyhan, 404 F.2d 522 (6th Cir. 1968); Martin's Auto Trimming v. Riddell, 283 F.2d 503 (9th Cir. 1960); Simmons v. United States, 334 F. Supp. 853 (W.D. Tenn. 1971); United States v. One Bally Pinball Machine, 231 F. Supp. 871 (E.D.S.C. 1964).

61. *See* SELECTIVE SERVICE LAW REPORTER, PRACTICE MANUAL 45, 46, 48.

mation dispensed, the decentralization of the System resulting in very loose controls by the National Office, and the extreme complexity of the statute, regulations and procedures. Often judicial decisions about draft matters were not communicated to or understood by local employees.[62] Occasionally, some clerks may have felt hostile to registrants who, in the clerk's eyes, sought to shirk an obligation; in such cases, they may have been less than candid in answering questions. Often, correct but sketchy advice was misunderstood. And it may well be that some of the alleged misadvice was the invention of persons who faced prosecution for refusing induction.

In many respects, selective service administration resembles immigration and naturalization administration. The subjects of regulation are vast in number, often poorly educated, lacking in economic resources and counsel, and often handicapped with severe language problems. The law is formidably complex and the stakes are very high. Consequently, both agencies are called upon to dispense great amounts of advice, assistance, and information. Thus the rather idiosyncratic development of estoppel law in Selective Service cases should be an instructive analogy in considering the same problem in immigration controversies.

Personnel at the National Office have stated that their policy was to somehow protect those who relied in good faith on misinformation given by local board employees.[63] Nevertheless, in a number of recent cases, a reliance interest was not protected by the agency. As a result, the courts had to explore the legal consequences of erroneous information given by local board employees and detrimentally relied upon by the registrant. Interestingly, these cases fail to make reference to the great body of case law relating to other areas of government activity in which reliance interests were asserted as the result of erroneous advice.

A typical case is *United States v. Burton*.[64] The registrant appeared before his local board and discussed his moral beliefs about killing. They advised him that he could not qualify for conscientious objector status. Consequently, he failed to claim such status. However, the advice was wrong. It was held that the registrant was entitled to have the jury consider the defense that he had reasonably relied on the erroneous advice. If established, he was entitled to acquittal.

62. *See* Rabin, *Do You Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption*, 1967 WISC. L. REV. 642.

63. *See* ADVICE, *supra*, note 4, at 183-84.

64. 472 F.2d 757 (8th Cir. 1973). *Similarly see* United States v. Timmins, 464 F.2d 385 (9th Cir. 1972); United States v. Bagley, 436 F.2d 55 (5th Cir. 1970); United States v. Burns, 431 F.2d 1070 (10th Cir. 1970); United States v. Cordova, 454 F.2d 763 (10th Cir. 1972); United States v. Fisher, 442 F.2d 109 (7th Cir. 1971).

Similarly, in *Powers v. Powers*,[65] the board secretary mistakenly told the registrant that he could not appeal his 1-A classification on grounds of physical disability until his pre-induction physical examination. Consequently, he failed to take an administrative appeal. Ordinarily, exhaustion of remedies is required in Selective Service controversies. However, the erroneous advice excused the failure to exhaust remedies.

On the other hand, the courts have held that confusion about Selective Service law or procedure is not itself grounds for reversal. A particularly harsh example is *United States v. Taylor*.[66] Form 150, on which registrants claim conscientious objector status, quoted the statute without reflecting the gloss placed upon it by the Supreme Court in *Seeger*.[67] Consequently, some of those whose objection to war centered on non-theistic philosophical grounds, rather than on a more traditional theistic basis,[68] were misled by the form and failed to claim conscientious objector status, although they might have been entitled to it. The court held that a mere uncounseled, unilateral, subjective decision based upon confusion about the law was not sufficient to excuse a failure to claim the exemption. It was held that the registrant should have asked for help from the available advisers. It feared that a contrary decision would cause an already "laboring vehicle" to become completely immobilized.

The cases have not yet clarified the showing of detriment which must be made. Some courts place the burden of proof on the government to show that the misinformation did not prejudice the defendant's rights.[69] Others take a much stricter view; they require the registrant to show that the detriment was substantial and the reliance reasonable.[70]

It is interesting to note that the Selective Service cases have not travelled some very well paved roads. They have not brushed aside erroneous information given by a clerk on the grounds that he had no authority to give advice, much less advice which is contrary to a statute or regulation. Nor have they suggested that the

---

65. 400 F.2d 438 (5th Cir. 1968). *Similarly see* United States v. Rabe, 466 F.2d 783 (7th Cir. 1972); United States v. Jacques, 463 F.2d 653 (1st Cir. 1972); Plotner v. Resor, 446 F.2d 1066 (5th Cir. 1971); United States v. Williams, 420 F.2d 288 (10th Cir. 1970); United States v. Bryan, 263 F. Supp. 895 (N.D. Ga. 1967).

66. 448 F.2d 349 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024. *Similarly see* United States v. Powers, 413 F.2d 834 (1st Cir. 1969), *cert. denied*, 396 U.S. 923 (1969).

67. United States v. Seeger, 380 U.S. 163 (1964).

68. *See generally* Rabin. *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966).

69. *See* United States v. Fisher, 442 F.2d 109 (7th Cir. 1971).

70. *See* United States v. Lansing, 424 F.2d 225 (9th Cir. 1970); United States v. Wroblewski, 432 F.2d 422 (9th Cir. 1970), *cert. denied*, 400 U.S. 997 (1971).

defendant is attempting to estop the government, a result proscribed by sovereign immunity. They have favorably entertained claims based on oral advice, although the clerk denied giving it. In fact, the Selective Service case law has developed without citing any of the cases from other administrative areas at all.

There are, of course, some substantial differences between Selective Service controversies and other kinds of administrative law disputes. Most obviously, Selective Service cases are criminal prosecutions; it plainly goes against the grain to send someone to jail whose apparently well-founded claim to an exemption or deferment was thwarted by misadvice from a local board employee.[71] Moreover, if the estoppel argument is sustained, the government loses little; it could often reclassify the registrant and begin the process anew.[72] On the other hand, it could be argued that estoppel claims should be dealt with rigorously in conscription controversies. The opportunities for fraudulent claims of estoppel based on oral statements cannot be overlooked. Perhaps the Army should not suffer delays in drafting someone or possibly losing the draftee entirely because of the errors of low-level government employees. Perhaps some draftees are actually well-counseled and can entrap the clerk into errors. Perhaps draftees should be compelled to "get it in writing" or perhaps reliance only upon the advice of government appeal agents, rather than clerks, should be permitted. Under emergency conditions, like those of World War II, the availability of an estoppel defense could prove to be a clog in the system. The highly limited nature of judicial review of draft cases might also counsel non-intervention by the courts.

On balance, however, the courts in the Selective Service estoppel cases have done well. The results in these cases mirror the realities of the administration of Selective Service during a highly unpopular war and widespread resistance to the draft.[73] The courts have understood the intense need of registrants for correct advice and the horrendous consequences which can follow from reliance upon wrong advice. The possibilities of fraudulent claims and of delays and burdens upon the administrative process have been rightly treated as an acceptable cost of operating a huge conscription system.

Unencumbered by antique doctrines of apparent authority and sovereign immunity, the courts have reached sensible results which would be quite unsurprising if both parties involved were

---

71. *See* MODEL PENAL CODE § 2.04(1)(a) & (b)(iv); United States v. Pennsylvania Industrial Chemical Co., 411 U.S. 655 (1973); Notes, 81 HARV. L. REV. 895 (1968) and 78 YALE L.J. 1046 (1969).

72. However, this was not always possible or feasible, especially if the registrant was close to the upper age limit to start with.

73. *See* Asimow, *Introduction to Selective Service Symposium,* 17 U.C.L.A. L. REV. 893, 904-05 (1970).

private individuals. However, these results become rather startling when one party is the government. The example of the draft cases is one which could easily be emulated by all courts confronted with controversies involving estoppel of the government. The draft cases should not be dismissed as criminal cases which have no bearing on more conventional judicial review. Instead, they could well serve as a model for a complete reevaluation of the problems of binding the government.

E. Binding the Government in Other Regulatory Cases

Outside the fields discussed in this article—government activity similar to the private sector, taxation, selective service, and immigration and naturalization—there are only a handful of cases.[74] Most of them fail to present the factual basis for an estoppel.[75] Of those that do, the majority hold closely to the rule that the government is not subject to estoppel and is not bound by unauthorized statements of its agents.[76]

One exception is *Klein v. SEC*[77] in which Klein appealed his expulsion from the National Association of Security Dealers. He was expelled for violating a rule requiring commercial honor and just and equitable principles of trade. Klein had sold oil royalties at a 50% markup, which apparently was in excess of their current market value. However, the expulsion was reversed; Klein's books had been audited only two years before and no question had been raised about identical transactions. In cryptic fashion, the court said: "We do not regard these facts as constituting an estoppel. We do hold that they constitute an interpretation of the rules on which Klein reasonably relied." The court noted that it was also influenced by the vagueness of the rule, approval of the general industry practice by an SEC staff member, and testimony by other oil royalty dealers that Klein's prices were fair.

II. BINDING THE GOVERNMENT IN IMMIGRATION AND NATIONALITY CASES

A. The Moser Case

In the preceding pages of this article, I have discussed the historical reluctance of the federal courts to permit private parties

74. Many such cases arise under specific statutes granting relief in connection with advice given by particular agencies. *See* ADVICE §§ 1.08, 3.02, 8.05, 8.28.

75. *E.g.*, United States v. Gross, 451 F.2d 1355 (7th Cir. 1971).

76. *E.g.*, St. Regis Paper Co. v. United States, 368 U.S. 208 (1961); West Texas Utilities Co. v. NLRB, 184 F.2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939. For additional cases, *see* ADVICE 74 n.96.

77. 224 F.2d 861 (2d Cir. 1955). *See also* United States v. American Greetings Corp., 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd per curiam*, 272 F.2d 945 (6th Cir. 1959); SEC v. Torr, 22 F. Supp. 602, 612 (S.D.N.Y. 1938).

to vindicate reliance interests against the government. The Supreme Court has held the government immune from equitable estoppel.[78] It has held that government officials lack the authority to bind their principal when they make mistakes, particularly mistakes concerning law or regulations. Tentatively, the lower courts have begun to undermine these doctrines, leaving the area jumbled and chaotic.[79] Only in selective service cases has there been a relatively uncomplicated development in the direction of protecting well-founded reliance interests.

All of this is a prologue to a discussion of binding effect in immigration and naturalization cases.[80] Surprisingly, the case law in this area has had its own unique development. It bears little resemblance to the case law in any other area of government operations, except perhaps for selective service. This may be explained by the fact that the INS has historically fared poorly in the courts, perhaps because of distrust by judges of the fairness of its procedures or their concern that only the judiciary can check abuses by the agency.[81] Perhaps it is the fact that the loss to the United States from being forced to accept one more alien or citizen seems inconsequential compared to the loss to the individual who faces deportation or loss of American citizenship. But it is clear that the results in estoppel cases involving immigration and naturalization have been on the whole quite favorable to the private parties. At the same time, the immigration cases have had only a minor impact on the development of estoppel law in connection with other government functions.[82]

The leading example is *Moser v. United States*[83] which stands apart from the long line of consistent Supreme Court cases which decline to bind the United States when it furnishes misleading information. Moser, a Swiss national residing in the United States, had filed in 1938 a declaration of intention to become a citizen. A treaty[84] between the United States and Switzerland provided that the nationals of each country residing in the other were exempt from military duty. A United States statute[85] provided that all foreign nationals could claim exemption from military service, but this would debar them from later becoming citizens. The

78. *See* cases discussed at text accompanying notes 12-20, 50-51 *supra*.
79. *See* cases discussed at text accompanying notes 27-46, 53-58, 64-70, 77 *supra*.
80. For an early discussion, *see* Gordon, *Finality of Immigration and Nationality Determinations—Can the Government Be Estopped*, 31 U. CHI. L. REV. 433 (1964).
81. *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1966).
82. *But see United States v. Lazy FC Ranch*, discussed in text accompanying notes 37-46, *supra*, for the first significant example of cross-fertilization.
83. 341 U.S. 41 (1951). *Similarly see* Fuchs v. INS, 329 F.2d 114 (1st Cir. 1964).
84. 11 Stat. 587, 589.
85. 54 Stat. 885, 55 Stat. 845.

Swiss legation believed that the statute was inconsistent with the treaty and it attempted to convert the State Department to this view. However, the only result of the efforts of the Swiss legation was that the form for claiming exemption was altered. Previously, it contained an acknowledgment that the applicant would be debarred from citizenship. The revised form removed the acknowledgment, but the governing statute was set forth in a footnote. When Moser was classified 1-A, he sought the assistance of the Swiss legation which sent him the revised forms. By letter the legation told Moser that the filing of the form would not be a waiver of the right "to apply for" citizenship. It noted that the final decision regarding his naturalization would remain solely with the competent Naturalization Courts. Moser signed, but it was found that he would not have done so if he had known that he was waiving his right to apply for citizenship.

The Supreme Court held that the treaty and the statute were consistent and that an application for exemption constituted a waiver of the right to be naturalized. But Moser's naturalization was upheld. The Court stated that it did not have to reach the question of estoppel. Instead, the Court decided that Moser had made no "intelligent waiver" of his rights, something required by "elementary fairness." He had been misled by the revision of the form and by the representation of the Swiss legation, the "highest authority to which he could turn." The total setting "lulled *this* petitioner into misconception of the legal consequences of applying for exemption."[86]

Moser is a surprising case. The petitioner's claim for binding the government was indeed a weak one. The form he signed explicitly set forth the statute which stripped him of the right to apply for citizenship. He did not seek advice from the U.S. government, only from the Swiss legation, and that advice was highly equivocal. The United States had apparently never acquiesced in the view that a Swiss national could become naturalized after claiming exemption. Yet the Court unanimously found in Moser's favor.

In 1958, Professor Davis wrote that *Moser*, not *Merrill*, would be the law of the future.[87] However, for fifteen years this prophecy did not come true. *Moser* bore surprisingly little fruit. Until recently, it had never been relied upon as the basis for binding the government outside the immigration area. However, the breakthrough may have arrived in 1973. In *United States v. Lazy FC Ranch*,[88] discussed in connection with the government contract cases,[89] the Ninth Circuit explicitly relied upon *Moser* for the

86. *Id.* at 46-47 (emphasis not added).
87. DAVIS § 17.09.
88. 481 F.2d 985 (9th Cir. 1973).
89. *See* text accompanying notes 37-46 *supra*.

proposition that the government is subject to estoppel. Thus Professor Davis' prediction may yet prove prescient; the liberal results in the immigration cases (and perhaps the selective service cases) may yet provide the impetus for a complete reformulation of the law.

B. Other Immigration and Naturalization Cases

Despite its rather slight penetration into other areas, *Moser* is quite typical of the immigration and naturalization cases. Usually, as in *Moser*, the courts have found ways to bind the government and protect reliance interests without using the taboo words "estoppel" or "apparent authority." In recent decisions,[90] however, the forbidden words have begun to appear.

After approximately one hundred years of Supreme Court cases declaring that the government could not be bound by estoppel, the 1950 decision in *Podea v. Acheson*[91] was a rather surprising departure. In *Podea*, the government claimed that the plaintiff had expatriated himself when he was inducted into the Romanian Army and swore allegiance to Romania. He did so after being erroneously informed by the State Department that he had lost his citizenship and thus was not entitled to an American passport. One would have expected the court to state that the government was not bound by the information dispensed by its agents based on legal errors, particularly since the result would be to prevent enforcement of the expatriation statute. On the contrary, however, the court held that expatriation was effective only if it was voluntary. Mistaken advice by the government led to Podea's involuntary conscription into the Romanian Army. Consequently, the government's mistake removed the voluntary element necessary to establish expatriation.[92]

The reasoning of *Podea* is quite similar to that of *Moser*, which followed a year later: misinformation can bear on the state of mind impliedly required by the statute. Consequently, an error by a government employee can prevent the government from placing a person into an undesirable status concerning citizenship matters, at least where state of mind can be read into the relevant statute.

Following *Podea* (decided in 1950) and *Moser* (decided in

90. *See* text accompanying notes 97-101, 107-108 *infra*.
91. 179 F.2d 306 (2d Cir. 1950).
92. For an analogous case involving the Federal False Claims Act, *see* United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966), discussed at text accompanying notes 32-33 *supra*. In criminal prosecutions, mistaken advice has been held to negate the state of mind necessary to commit a crime. *See* Heikinnen v. United States, 355 U.S. 273 (1958); United States v. Pennsylvania Industrial Chemical Co., 411 U.S. 655 (1973); MODEL PENAL CODE § 2.04(1)(a)(3); (b)(iv).

1951), the federal courts began to develop techniques to bind the government in immigration and naturalization matters without using the forbidden words of "estoppel" or "apparent authority." Thus in *McLeod v. Peterson*,[93] the district court held that McLeod was ineligible for suspension of deportation since he lacked five years of continuous presence in the United States. The interruption was caused by an earlier deportation proceeding in which the special inquiry officer erroneously refused to permit any consideration of suspension. Furthermore, the officer made promises that he would help McLeod get back to the United States through an application for relief by his wife. McLeod relied on these promises of help—which never materialized—and left the country. The court held that the government could not utilize its own error as a device for barring the assertion of a right by a victim of the error. Congress could not have intended an illogical trap by which the alien could be deprived of his rights through mistakes by government officials. Although the word "estoppel" never appears, the result was protection of a reliance interest created by the INS.

Similarly, *Tejeda v. Immigration and Naturalization Service*[94] excused the failure of an alien to meet time limitations because of erroneous information provided by a government employee. Petitioner had been a resident alien and had taken a trip to the Philippines. He overstayed the expiration date on his re-entry permit. He sought to return to the United States in 1947, but the American consul told him that he could not do so. This statement was wrong; a statute[95] then in effect provided that petitioner could have resumed his residence in the United States as a nonquota immigrant. However, the right to do so lapsed in 1951. Relying on *Moser* and *McLeod*, the Ninth Circuit held that it would be "manifestly unjust" if misadvice by the counsel caused petitioner not to pursue his rights. The matter was remanded to give petitioner a chance to prove these facts.

In *Hetzer v. Immigration and Naturalization Service*,[96] the petitioner sought to set aside a visa which he had previously applied for and received. This visa would have precluded him from becoming a permanent resident. He argued that he had detrimentally relied upon misleading advice from an adviser in the INS' district office. The INS Special Inquiry Officer and the Board of Immigration Appeals rejected this argument. The Ninth Circuit reversed, since it found that the Board's evidentiary findings did not compel its ultimate findings. However, the court had no

93. 283 F.2d 180 (3d Cir. 1960).
94. 346 F.2d 389 (9th Cir. 1965).
95. 22 U.S.C. § 1281 (1970).
96. 420 F.2d 357 (9th Cir. 1970).

doubt that relief was available if Hetzer established that he had relied upon misleading advice.

Finally, a few judges have declared straightforwardly that the government can be bound by estoppel or apparent authority in immigration cases. *Petition of LaVoie*[97] is such a case. *LaVoie* is the naturalization case involving the wife of a Peace Corps director, which was discussed at the beginning of this article. In part, the district court relied on *McLeod* for the proposition that the government could not establish interrupted residence when its own error was responsible for the discontinuity. But it went on to hold squarely that the government could be bound by estoppel in immigration cases.

Rather unconvincingly, it sought to distinguish the powerful precedents from other areas such as *Utah Power and Light*, *Merrill*, or the tax cases.[98] More persuasively, the court observed that immigration and naturalization cases involve a claim by only a single individual for a precious status, one which does not truly endanger any public function or program.[99]

An even bolder assertion of estoppel came in the *Gestuvo*[100] case. In 1968, the INS and the Labor Department certified Gestuvo as eligible for preference as a professional. Apparently, however, this certification was erroneous. After the certification expired in 1970, the agencies refused to recertify him and sought to deport him. The court held that Gestuvo reasonably believed that the government knew what it was doing when it certified him in 1968 and thus caused him to rely by staying in the United States for two years, rather than developing his career in the Philippines.

The court held that the government was estopped to change its position. It wrote a powerful opinion in favor of estoppel in immigration cases, correctly labelling the traditional no-estoppel rule as a vestige of the crumbling doctrine of sovereign immunity. It declared:

> The national interest lies in a conscientious review by the Service of the applications that are submitted to it at the time of their submission; it does not lie in sacrificing a man's efforts and hopes to a mechanical and inhuman application of administrative regulations. People like Gestuvo rely on the Service to reach accurate rulings on which they can base their plans. It was the Service that led Gestuvo down the path towards permanent residence. Having done so, it should not

---

97. 349 F. Supp. 68 (D.V.I. 1972).
98. *See* text accompanying notes 17-21, 50-51 *supra*.
99. 349 F. Supp. at 74.
100. 337 F. Supp. 1093 (C.D. Cal. 1971). This case is still on appeal in the Ninth Circuit. Oral argument occurred in May, 1974.

have shoved him into a ditch along the way. Its action was improper.[101]

Despite the court's stirring tribute to estoppel, *Gestuvo* seems a rather weak case on its facts. Estoppel, after all, requires that the defendant have induced detrimental reliance. The detriment which was claimed by Gestuva was that he had wasted two years in which he might have furthered his career in the Philippines. But it seems inherently unlikely that Gestuvo really relied on the government's error. On the contrary, it seems likely that he would have elected to stay in the United States (with its higher wage structure), even if he had known in 1968 that the government had erred and that he might have to leave in 1970. Nor did he convincingly demonstrate any detriment; the loss of two years of career advancement in the Philippines seems relatively insignificant compared with two years of high wage-earning capacity in the United States. Finally, the remedy—permanent U.S. residence—seems out of proportion to the detriment sustained, even if there was any detriment.

Thus, until 1973, it appeared that the courts were finding ways to vindicate reliance interests created in immigration and naturalization cases. Even the Supreme Court in *Moser* had apparently fallen victim to the temptation. Increasingly, they were coming to use the appropriate terminology for their decisions. Yet matters were far from clearly resolved. In *Montana v. Kennedy*,[102] a 1961 Supreme Court case, issues of estoppel were presented but were rejected by the Court on factual grounds. It was found that the government had not prevented petitioner's mother from returning to the United States; at most, a consular official had merely suggested she not travel while pregnant. But the Court noted:

> In this light the testimony by petitioner's mother as to what may have been only the consular official's well-meant advice . . . falls short of *misconduct* such as might prevent the United States from relying on petitioner's foreign birth. In this situation we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is *estopped* to deny citizenship because of the *conduct* of its officials.[103]

101. *Id.* at 1102-03.
102. 366 U.S. 308 (1961).
103. *Id.* at 314-15 (emphasis added). The court cited *Podea v. Acheson*, discussed at text accompanying notes 91-92 *supra, and* Lee You Fee v. Dulles, 236 F.2d 885 (7th Cir. 1956), in which a dictum states the possibility of binding the government. Interestingly, neither case used the term "estoppel" despite the manner in which the Supreme Court described them. Peignand v. INS, 440 F.2d 757 (1st Cir. 1971) *and* Talanoa v. INS, 397 F.2d 196, 201 n.6 (9th Cir. 1968), also state that the issue of whether the government can be estopped in immigration cases is in doubt.

Certainly, the language in *Montana* did not suggest that the Supreme Court was rejecting estoppel in immigration and naturalization cases—quite the contrary. Nor did it appear that it was setting any restrictions on the type of misconduct by government officials which might be the basis for an estoppel. But then came *Immigration and Naturalization Service v. Hibi.*[104]

C. *The Hibi case*

Hibi, a Philippine citizen, served in the Philippine Scouts during World War II—concededly a part of the United States Army. He took part in resisting the Japanese invasion of the Philippines and fought in the defense of Bataan and Corregidor. He was captured by the Japanese following the siege of Corregidor and was a prisoner of war for about six months. He rejoined the Army in 1945 and served until his discharge in December 1945, after the end of the War.

Sections 701 to 705 of the Nationality Act of 1940 (as amended in 1942 and 1944)[105] provided that foreign citizens who served in the United States Armed Forces could become naturalized American citizens without compliance with the usual formalities for naturalization. In particular, the statute provided that it would not be necessary to appear in a United States District Court to be naturalized. Instead, the INS was to send naturalization examiners to appropriate locations to accept naturalization petitions. Regulations were to be adopted which would implement the statute. However, the special rights to naturalization under section 701 could only be utilized while the alien was still in the armed services. Furthermore, all rights under this law expired on December 31, 1946.

After the liberation of the Philippines in 1945, a controversy arose between the American and Philippine governments. There was concern that every soldier in the Philippine Army might qualify under the statute, since the Philippines were still a United States territory. The Philippine government expressed concern that very large numbers of its young men might become United States citizens and depart, a matter of serious concern on the eve of Philippine independence. This dispute was settled by withdrawing naturalization authority from the United States consul who had been previously deputized to carry out this chore. Later, it was determined that the Philippine Army was not the United States Army for purposes of section 701. However, the Philippine Scouts, in which Hibi served, were considered part of the United States Army. Ultimately, a naturalization examiner returned to

104. 94 S. Ct. 19 (1973) (*per curiam*).
105. 56 Stat. 182 (1942), 58 Stat. 886 (1944).

the Philippines and naturalized a number of Scouts. However, by this time, Hibi had left the service. He never found out about the lost rights to naturalization until much later. It was found that he would have taken advantage of the rights to naturalization if he had known of them and if an examiner had been available.

The Army's regulations imposed duties on commanding officers to inform noncitizens of their rights to apply for citizenship, to assist such persons who desired to make application, and to expedite by all possible means completed action on such applications.[106] It was undisputed, however, that no effort had been made to notify Hibi or his Scout unit of their rights to citizenship.

Finally, in the 1960's, Hibi came to the United States on a temporary visa and petitioned for naturalization. The District Court granted it, holding the government estopped to plead the statute of limitations.[107] The Ninth Circuit affirmed,[108] holding that the government could be estopped in naturalization cases.

The Supreme Court granted *certiorari* and summarily reversed the Ninth Circuit. Its *per curiam* opinion cited *Montana* for the proposition that possibly the government could be estopped by "affirmative misconduct."[109] However, the government's inaction in *Hibi* was not "affirmative." The three dissenters thought that the withdrawal of authority from the consul in the Philippines was sufficiently "affirmative."

The summary reversal by the Supreme Court was unfortunate. Its treatment of the *Hibi* case can only be described as cavalier. In fact, the case presents fundamental issues of great importance, issues which were inadequately developed in the opinions below and the petitions for and against *certiorari*. The Court's unexpected summary reversal prevented counsel from properly briefing and arguing these issues.

The rationale for the *Hibi* decision—that the government's conduct was not affirmative—seems erroneous. Estoppel can certainly arise from silence or other conscious inaction, where there is a duty to speak or act, when that silence or inaction prompts detrimental reliance.[110] Although there may be a distinction be-

106. War Department Circular No. 382, issued September 21, 1944, quoted at 475 F.2d 10 n.3.

107. No. 180627 (N.D. Cal., Nov. 5, 1971).

108. INS v. Hibi, 475 F.2d 7 (9th Cir. 1973).

109. 94 S. Ct. at 21. The term "affirmative misconduct" although placed in quotation marks by the Supreme Court in *Hibi* was not used in *Montana*. *Montana* merely used the term "misconduct." *See* text preceding note 103, *supra*.

110. In the immigration and naturalization field, a number of cases have excused failures to meet applicable dates (for example, a requirement to return to the United States by a prescribed date). In each case, the noncompliance was excused because it was caused by the failure of immigration officials to process paperwork on time. The government's misconduct was passive—failure to perform a task. Lee You Fee v. Dulles, 236 F.2d 885 (7th Cir. 1956) (*dictum*, but

tween action and inaction in other contexts, it matters little in estoppel cases.

A greater difficulty in applying estoppel is the possible lack of a connection between the government's inaction and detrimental reliance by Hibi. An estoppel only arises if the government's action or inaction induces the private party to rely to his detriment. Spelling out a reliance interest in *Hibi* requires some strain. The argument would be that Hibi's separation from the Scouts (and his failure to re-enlist) proved quite detrimental to him, since he could be naturalized under the special provision only while he remained in the Service.[111] Although Hibi was entirely unaware of his naturalization rights at the time, this ignorance should not count against him because of the government's wrongful failure to publicize the right.[112] If Hibi is deemed to have had knowledge of the right, and also of the fact that the government was refusing to naturalize anyone under the statute, then perhaps he "relied" on the government's inaction by permanently leaving the Scouts. Of course, it is somewhat more likely that this separation from the Scouts was not a consensual decision at all; probably, he left when he was ordered to. Consequently, it is questionable whether he "relied" on the government's inaction.

The *Hibi* case should not have turned on whether the government's misconduct was active or inactive or upon whether detrimental reliance had been shown. Instead, it raises much more fundamental questions. Congress explicitly ordered that aliens serving in the armed forces be given the right to naturalization. The administrative mechanism for accomplishing this end was specified in the statute. Yet the Executive refused to implement the statute. Consequently, the rights of Philippine Scouts like Hibi were effectively snuffed out. Thus *Hibi* presents the issue of whether the Executive has power to refuse to carry out the will of Congress, thus thwarting individual rights.

Recently, a very similar issue has arisen in the context of Executive impoundment of funds appropriated by Congress. The

---

cited in the Supreme Court decision in *Montana*); Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954); Application of Martini, 184 F. Supp. 395 (S.D.N.Y. 1957); Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D. Haw. 1951); Lee Hong v. Acheson, 110 F. Supp. 60 (N.D. Cal. 1953); Hichino Uyeno v. Acheson, 96 F. Supp. 510 (W.D. Wash. 1951). Many other estoppel cases have based a protectable reliance interest upon inaction or silence when there was a duty to act or speak. Pomeroy, for example, states: "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." 3 POMEROY, EQUITY JURISPRUDENCE § 802 (5th ed. 1941): 31 C.J.S. *Estoppel* §§ 72, 87 (1964); Wiser v. Lawler, 189 U.S. 260, 270 (1903).

111. The District Court found that Hibi would have been naturalized, if the opportunity had been available.

112. *See* text accompanying notes 124-25 *infra*.

Executive claimed power to impound funds as an anti-inflation device. The commentators have argued persuasively that there is no such constitutional power.[113] To allow the President to defy the will of Congress is to give him an item veto power in addition to the constitutionally provided veto. It would seem that the provision of one type of veto power would exclude the possibility of implying a second one. The obligation of the President is to execute the laws. This hardly suggests a power not to execute them.

Instead, the impoundment cases have turned on an analysis of Congressional intent. In the highway cases, the courts found that Congress intended to give the Executive no discretion whether or not to spend the money. Consequently, the court ordered the Executive to release the funds.[114] But in a case involving appropriations for water pollution abatement, the court held that Congress did intend to give the Executive discretion about when to spend the money.[115] Consequently, an immediate disbursement was not ordered.

This kind of analysis should have been applied in the *Hibi* situation. Congress apparently intended no discretion; there is not the slightest hint in the relevant legislative history that Congress wanted the President to have discretion not to send out the examiners. Instead, the legislative history shows a clear Congressional desire to confer the priceless benefit of citizenship upon alien soldiers who had served the United States.[116] Congress relied on the precedent of comparable World War I legislation, the history of which demonstrates also an unequivocal Congressional desire to use citizenship as a form of inducement to alien soldiers.[117]

However, one might reply that the Executive's foreign relations power was involved in making the policy decision not to sta-

113. *E.g.*, Comment, *Presidential Impounding of Funds—the Judicial Response*, 40 U. CHI. L. REV. 328 (1973).

114. *E.g.*, State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

115. Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 501 (4th Cir. 1973).

116. *See* H. REP. 1765 *and* S. REP. 989, 77th Cong. 2d Sess. (1942); 88 CONG. REC. 631, 1589, 1643. The House Report states: ". . . ordinary procedure requiring naturalization by a court is supplemented by provision for the naturalization of aliens by a representative of the Immigration and Naturalization Service in areas not within the jurisdiction of any naturalization court. Thus members of the armed forces are not barred from citizenship because of their location in a military or naval base far from any naturalization court." H. REP. 1765, at 10.

117. 40 Stat. 542 (1918). *See* S. REP. 388, 65th Cong. 2d Sess. (1918). The Committee wrote in 1918: "This Committee has realized that it will be of paramount importance that the machinery for carrying into effect the provisions of this act shall be set in motion at the earliest possible moment so that the American soldiers of foreign birth nor in our Armies may have citizenship conferred upon them." *See also* S. REP. 136, 65th Cong. 1st Sess. (1917); 56 CONG. REC. 5009, 5999-6000, 6009-10.

tion examiners in the Philippines until the disagreement with the Philippine government was solved. Arguably, in the foreign relations sphere, the President can thwart a statute, even if he could not do so in a domestic matter. This argument seems clearly wrong. Unlike most foreign relations situations, Congress legislated under a specifically delegated Constitutional power—to make uniform laws of naturalization.[118] None of the authority which suggests that the President has wide extra-constitutional powers in foreign relations[119] gives any indication that he can act contrary to the will of Congress. This is particularly true when the area is clearly allocated by the Constitution to Congress and that body has acted unambiguously.[120] It seems quite clear that the President's generalized foreign relations powers must yield to an explicit naturalization statute.

Assuming, then, that the Executive exceeded its powers in withdrawing naturalization authority from the Philippine consul, perhaps Hibi might have had relief of some sort in 1945. But he did not seek it. Is Hibi too late in seeking relief now? I contend that a waiver of the limitation period is an entirely appropriate remedial device. By illegally thwarting a statute, the Executive caused irreparable injury to Hibi and others similarly situated. Since he knew nothing of the right, he could not have taken action to force compliance with the law in 1945.[121] As a result, the passage of time caused extinction of the right.

Estoppel cases frequently involve a refusal to let a party plead the statute of limitations when it would be unfair to do so.[122] Although *Hibi* may or may not properly be an estoppel case, similar relief seems abundantly warranted. No other method of rectifying the harm caused by the illegal action is apparent. Yet the harm to the United States from allowing the relief seems slight.[123]

In addition, Hibi had another basis to seek relief from the United States. A regulation apparently required the Army to at

118. U.S. CONST. art. I, § 8, cl. 4: "The Congress shall have power . . . to establish a uniform rule of naturalization . . . ."

119. *See generally* HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, chap. 2 (1972).

120. *See generally id.*, chapter 4, especially at 104-07.

121. Hibi's lack of knowledge concerning this right should not have been held against him. *See* text accompanying notes 124-125 *infra*.

122. *See, e.g.*, the immigration and naturalization cases cited in text accompanying notes 93, 94 and 97, *supra*, and in note 110, all of which involve excuses from failure to meet deadlines. *See generally* 53 C.J.S. *Limitations* § 25 (1964).

123. It is possible that there might have been a fairly large-scale effect from a holding in favor of Hibi. The unmarried children of naturalized persons would receive first preference for immigration visas, thus displacing other Philippinos awaiting immigrant visas. Although the government estimated that there might be as many as 80,000 who would take advantage of this provision, Petition for Certiorari 17, Hibi's brief estimated that only a few hundred persons would take advantage of it. Memorandum in Opposition to Petition for Certiorari, 19.

least attempt to notify him of his rights to naturalization.[124] Yet it was undisputed that nothing had been done to notify him. It is a fundamental principle of administrative law that the government is bound by its own regulations.[125] Although the exigencies of war might well have excused the Army from bringing the naturalization right to the attention of every member of the Philippine Scouts, the government should at least have been compelled to establish facts which constitute a valid excuse for not following its own regulation. Again, the consequence of failing to notify Hibi of his rights may well have been the extinction of that right because of his leaving the Scouts and not re-enlisting. Consequently, the government should not have been allowed to rely upon the defenses of limitations or on Hibi's separation from the service. But this significant argument was not so much as mentioned by the Supreme Court.

In its petition for *certiorari* in *Hibi*, the government relied upon *Tai Mui v. Esperdy*[126] to show that the Ninth Circuit was in error. *Tai Mui* does have some similarity to the *Hibi* case but it seems clearly distinguishable and perhaps wrongly decided. *Tai Mui* involved, among other issues, a provision of the immigration statute granting preferential rights to refugees.[127] Like the statute involved in *Hibi*, the provision required implementation by regulations. But the regulations provided only seven countries in which examinations by INS personnel could occur. Yet it was required that the alien be physically present in the country where the examiner was located. None of the countries were in the Far East. As a consequence, Chinese refugees were unable to take advantage of the procedure.

The court refused to grant any relief to the Chinese refugee plaintiffs. It did so on several grounds:

(a) It doubted its power to grant any relief. It felt that it could hardly command the Attorney General to supply the office needed—although the court failed to explain precisely why it could not do so. It thought it might stay the deportation of all Chinese refugees from the United States until an office was established—but this was labelled as "strong medicine indeed." Thus *Tai Mui* turns in part upon lack of an appropriate remedy, although the court seems unduly timid on this score.[128]

---

124. *See* text preceding note 106 *supra*.

125. *E.g.*, Service v. Dulles, 354 U.S. 363 (1957). *See generally* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

126. 371 F.2d 772 (2d Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967), cited at 13 of the Government's petition. The Government also relied on Cheng Ho Mui v. Rinaldi, 408 F.2d 28 (3d Cir.), *cert. denied*, 395 U.S. 963 (1969), which follows *Tai Mui*.

127. Immigration and Nationality Act Amendments of 1965, 79 Stat. 911, 912-13.

128. 371 F.2d at 780.

(b) The Service did not act arbitrarily in not establishing any offices in the Far East. This was based on an analysis of legislative history suggesting that Congress did not wish to put offices there. But the analysis of legislative history is singularly unpersuasive. It is based only on a self-serving letter from the State Department to the Assistant Attorney General, based on practice under an earlier refugee law. Purportedly Congress was aware of the practice under the earlier law when it enacted the new one. Although this may be true, the court's treatment of the issue can only be characterized as a brushoff.[129]

(c) Finally, the court found that there had been no showing of discrimination against Chinese refugees because quite a few of them had succeeded in getting preferences by a different procedure. But again, the court's reasoning is not persuasive. For one thing, the other procedure was no longer in effect. And, in addition, it seems difficult to understand how the fact that some Chinese refugees had gained admission under a different statute could validate the apparent arbitrariness of the INS in refusing to supply examiners to accept Chinese refugees under the statute in dispute.[130]

Thus the opinion in *Tai Mui* is quite unconvincing. Even if it is correctly decided, however, it does not support the result in *Hibi*. True, *Tai Mui* upholds the discretion of the INS in not posting examiners in a particular country—exactly the problem involved in *Hibi*. But *Tai Mui* turns on the holding that the INS' refusal to post examiners was in accordance with Congressional intent. And this is exactly the issue in *Hibi*. Does the failure to post examiners in the Philippines accord with the will of Congress? I have argued that it does not. Consequently, *Tai Mui* tells us nothing about the correct result in *Hibi*. Furthermore, the relief sought in *Hibi*—non-application of the statute of limitations—seems less drastic that the relief sought in *Tai Mui*, which the court doubted that it had power to order.

In summary, *Hibi* should not slow down the accelerating trend in the federal courts toward estopping the government in an appropriate case or applying the doctrines of apparent authority to the agents of the government. In fact, *Hibi* does not deny the power of the court to estop the government; it merely requires "affirmative misconduct" before the claim can be considered. Although this is an unnecessarily narrow definition of estoppel, it will be adequate to cover most worthy cases, since few of them rest upon inaction alone. Therefore, although *Hibi* seems a great injustice to veterans of the Philippine Scouts, it would seem to

129. *Id.*
130. 371 F.2d at 780-81.

have done no lasting damage to the cause of estoppel of the government.

III. CONCLUSION

Despite the disappointing decision in *Hibi*, it would seem that estoppel in the field of immigration and naturalization is still alive and well. The task of extending the liberal doctrines developed in immigration and selective service law, as well as in the recent government contract cases, to all the actions of the federal bureaucracy still remains. It is time for the Supreme Court to address itself to that task.

Many writers have called upon the courts to reconsider the underlying principles relating to the authority of government agents to make mistakes and to immunity of the federal government from estoppel.[131] A fresh evaluation is certainly long overdue. The reasoning in Supreme Court opinions suggests that there has been no fundamental reappraisal since *Lee v. Munroe*[132] established the basic principles in 1813. The Supreme Court should grant *certiorari* in a case which contains the factual elements of apparent authority and estoppel and undertake a thorough analysis of these problems.[133]

When the Court does so, it may well discover that the premises which have always guided it are unjustifiable in the present state of government. It is no longer realistic or just, if it ever was, to hold every person dealing with the government to knowledge of everything in the statute books and the Federal Regis-

131. DAVIS, §§ 17.01-.05 (1958 and 1970 Supp.); Whelan and Dunigan, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L.J. 830 (1967); Lynn and Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487 (1964); McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 GEO. WASH. L. REV. 162 (1957); Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954); Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281 (1935); Notes, 42 So. CAL. L. REV. 391 (1969); 28 NOT. D. LAW. 234 (1953). Even the deputy general counsel of the Immigration and Naturalization Service appears to concede the inevitability of the expansion of estoppel against his agency. Gordon, *supra* note 80, at 466.

132. 11 U.S. (7 Cranch) 366 (1813). Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) stated at p. 383 that it was "too late in the day" to treat the United States the same as other litigants. The decision in *Hibi* also remarked that "It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." INS v. Hibi, 94 S. Ct. 19, 21 (1973). The Court went on to quote from Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), discussed at text accompanying notes 17-19 *supra*.

133. The Supreme Court recently indicated its willingness to do so by estopping the government in a criminal case by reason of reliance upon an erroneous regulation. United States v. Pennsylvania Industrial Chemical Co., 411 U.S. 655 (1973). Enactment of a statute to facilitate judicial reexamination is suggested in ADVICE, *supra* note 5, at 63-68.

ter.[134] As a matter of practice, most agencies consider themselves bound b yerroneous advice;[135] a number of statutes change these rules in specific situations.[136] Thus it may well be that the legal doctrines to the contrary serve no useful purpose. It no longer seems credible that the government will be ruined by a judicious application of estoppel,[137] any more than it has been through such statutory waivers of sovereign immunity as the Tucker Act or the Federal Tort Claims Act.[138] Although potentially a problem, collusion between the private party and a government official[139] can be dealt with through criminal penalties and through cautious application of estoppel principles by federal judges. The possibility of collusion hardly warrants the doing of injustice to those who deal with the government in good faith.

It has also been suggested that the principles of no-apparent authority and no-estoppel actually rests on the fundamental base of the separation of powers.[140] The idea is that the use of estoppel to prevent the executive from correcting an error of law would mean in substance that the executive has legislated. But our modern conception of the separation of powers is that it is an ideal, not an infallible prescription for the day-to-day affairs of government. In any event, the application of estoppel hardly means the repeal of a statute; it would simply preclude the retroactive correction as to particular individuals of a particular mistake, spreading the loss over all the people rather than the unfortunate individuals who relied to their detriment upon a governmental error or misrepresentation.

Of course, a determination that apparent authority and estoppel may bind the federal government only opens a particular inquiry. The application of these doctrines may in fact be most inappropriate. Someone represented by competent counsel or himself sophisticated in dealing with the government should know or have researched what readily accessible statutes or regulations provide, or should know which government official is empowered to give advice if one is available, or to "get it in writing." A piece

---

134. As explicitly held in *Merrill, supra* note 132.

135. *See* ADVICE, *supra* note 5, at §§ 3.02 & 1.08 & chapter 8.

136. ADVICE 30 n.6. *See* Gerstle v. Gamble Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973).

137. The Floyd Acceptances, 74 U.S. (7 Wall) 667 (1869).

138. Furthermore, since a court is conducting judicial review, the government must already have waived sovereign immunity and consented to suit in respect to the particular administrative action being reviewed.

139. Lee v. Munroe, 11 U.S. (7 Cranch) 366 (1813); Whiteside v. United States, 93 U.S. (3 Otto) 247 (1876).

140. See the excellent treatment of Whelan and Dunigan, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L.J. 830 (1967). They point out that many estoppel cases are in fact efforts to avoid statutes which forbid the payment of funds without an appropriation and which deny effect to contracts which would have this effect.

of careless misinformation or misconduct by a low-level government employee might—if it cannot be retroactively corrected—destroy an entire government program, permit a vital statutory policy to be undermined, or do injury to a large class of citizens or conflicting private interests. Thus in a particular case, the application of apparent authority or estoppel might do much more harm to the government than the misinformation did to the person relying on it. But these very real possibilities are hardly the basis for a blanket no-estoppel policy. They call upon the court of equity to do what it always has done—to weigh the equities, sensitively determine who has been injured, and determine the appropriate measure of relief. This may well mean that a factually established estoppel cannot be asserted if the loss to the government outweighs the damage to the private party or if estoppel would be manifestly unfair to another interested party. But it is time to move on to this level of analysis, leaving behind the archaic ideas that government agents never have authority to err and the government is immune from estoppel.